

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SOUTHERN KERN UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2013010845

ORDER DENYING STUDENT'S
MOTION TO SHIFT BURDEN OF
PROOF

Student filed a request for due process hearing (complaint) with the Office of Administrative Hearings (OAH) against the Southern Kern Unified District (District) on January 28, 2013. Imbedded beginning on page 50 of Student's 53 page complaint is a motion to shift the burden of proof in this case to the District. This motion is not referenced in the caption of Student's complaint. On February 5, 2013, the District filed an opposition to Student's motion. Student filed a reply to the District's opposition on February 5 as well. On February 12, 2013, Student refiled his motion in a separate pleading.

APPLICABLE LAW

Under the Individuals with Disabilities Education Act (IDEA), the party filing a due process action to determine whether the local education agency provided a student with a free appropriate public education has the burden of persuasion in the due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 57-61 [126 S.Ct. 528, 163 L.Ed.2d 387]) (*Schaffer*.)

DISCUSSION

Student moves to shift the burden of proof in this case as to issues regarding Student's placement and services for the 2012-2013 school year. Student contends that the placing the burden of proof on the District is warranted because the District failed to file for due process when Student's parent disagreed with the District's offer to Student of an individualized education program (IEP) for the present school year. Student contends that shifting the burden is warranted because Education Code, section 56346, subdivision (d) states:

If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the individualized education program after having consented to those services in the past, the local educational agency shall file a request for due process pursuant to Chapter 5 (commencing with section 56500).

Student, however, offers no authority in support of his contention that the cited section of the Education Code results in the shifting of the burden of proof to a school district in a student-filed due process case, even assuming that the district had committed a procedural violation of the Education Code by failing to file for due process. Student has not established that OAH should change the United States Supreme Court's clearly enunciated position in *Schaffer* that Congress intended in the IDEA to place the burden of persuasion on the party who files the due process hearing request, pursuant to the common law rule that the party seeking relief has the burden of persuasion. Therefore, Student has the burden of persuasion as to all issues in this case as the party seeking relief.

ORDER

Student's motion to shift the burden of proof to the District as to placement and services for the 2012-2013 school year, is denied.

Dated: February 15, 2013

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings